Liberty's failure to seek a cable franchise for its non-common systems allowed Liberty to avoid having to comply not only with local franchising obligations (including the obligation to pay up to five percent of revenues to the City as a franchise fee), but also with the numerous "public interest" obligations imposed on cable operators under federal statute and the regulations of this Commission -- e.g., must-carry obligations, customer service standards, PEG channel set asides, commercial leased access requirements, rate regulations, technical and safety standards, political programming requirements, etc. Liberty was clearly aware of these obligations and, indeed, had publicly railed against their economic consequences. Thus, the evidence shows that Liberty had ample motive to conceal its hardwire connections from both its competitors and regulatory authorities.[116]

3. Liberty's False 18 GHz Applications To The FCC.

The Joint Motion acknowledges that during the fall of 1994, Liberty prepared for the contingency that it would be ordered by the NYSCCT to cease service by hardwire interconnection. Moreover, it observes that Liberty directed Mr. Nourain to perform the work necessary to prepare the hardwire locations to receive transmissions by microwave.[117] Thus, the Joint Motion states that on "November 7, 1994, Liberty filed for modifications of

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[116]Although the Joint Motion contends that "there are no facts to show that Liberty knowingly and intentionally interconnected buildings by hardwire in order to violate the law or to avoid legal requirements" (Jt. Mot. at ¶ 81), that argument misstates the relevant inquiry. The evidence shows that Liberty hardwired buildings to achieve cost savings and, in some instances, to provide service where there was no line-of-sight necessary to establish a microwave connection. Ceccarelli Dep. at 65:4-10, 71-74 (Ex 13). Liberty concealed those hardwire connections from this Commission and other regulatory authorities, and made spurious claims regarding their legality, to avoid the legal requirements imposed on all other cable operations.

[117]Jt. Mot. at ¶ 62.

previously granted Commission 18 GHz licenses to open paths for the following buildings being served by hardwire: 239 East 79th Street, 525 East 86th Street, 44 West 96th Street and 60 Sutton Place."[118] This statement is wrong, and it omits a variety of material facts relevant to Liberty's basic qualifications in this proceeding. On November 7, 1994, Liberty filed applications to open 18 GHz paths for nine locations that were then being served illegally by hardwire connections, not merely the four locations cited in the Joint Motion. In addition to the buildings listed in the Joint Motion, Liberty filed applications for the following locations: 425 East 58 Street (FCC File No. 708781); 170 West End Ave. (FCC File No. 708778); 120 East End Ave. (FCC File No. 708779); 220 East 52 Street (FCC File No. 708777); and 55 Central Park West (FCC File No. 708778). The undisputed evidence shows that Liberty was illegally providing cable service to each of these locations when it filed its 18 GHz applications with the Commission.[119] Yet Liberty failed to disclose that fact in its applications to the Commission.

Also omitted from the Joint Motion was the fact that, in each of its nine 18 GHz applications, Liberty represented to the Commission that it was eligible for the award of an OFS license under FCC regulations and that it was a "SMATV" operator proposing to serve "private cable" buildings and subscribers.[120] No mention was made of the fact that these

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[118]Id.

[119]HDO, App. B; JX 21 at 3.

[120]See, e.g., Ex. 14. Notably, Liberty had also made the same representations in earlier OFS filings with the Commission. Thus, for example, in an application dated April 22, 1993, Liberty provided the same description to facilitate the grant of authority to operate a receive site located at 12 W. 96th Street. Thereafter, Liberty also used that site to serve a non-common building located at 44 West 96th Street, 12 buildings down the block, by

(continued...)

OFS paths were being sought to replace illegal hardwire connections, nor was any mention made of TWCNYC's complaint to the NYSCCT or to the subsequent enforcement proceeding initiated thereby. At the same time, none of the applications were served on TWCNYC, despite the fact that five of the buildings for which Liberty was seeking to serve by OFS paths had been specifically identified in TWCNYC's complaint to the NYSCCT.[121]

Although the Joint Motion concedes, as it must, that Liberty failed to disclose its hardwire connections to the Commission (and thereby mischaracterized itself), the Joint Motion repeatedly asserts that Liberty did not "conceal" these material facts from the Commission.[122] The Joint Motion contends that the Commission knew or should have known about Liberty's hardwire connections by virtue of the fact that, through the United States Department of Justice, the FCC participated in litigation "in which the legality of Liberty's hardwire connections were directly at issue."[123] Thus, the Joint Motion suggests that Liberty merely committed a "technical violation" of the Commission's reporting requirements, for which a modest monetary forfeiture would be appropriate.[124] Unfortunately, the facts of record contradict this argument. Whatever information the

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[120](...continued)
hardwire interconnection. HDO, App. B. Liberty continued to describe its eligibility and purported use in the same deceptive language for over a year and a half after the Supreme Court upheld the constitutionality of the Commission's Definitional Order in Beach Communications.

[121]JX 21 at 2-3.

[122]Jt. Mot. at ¶¶ 80, 85.

[123]Id.

[124]Id. at ¶ 86.

Commission may have learned that Liberty was something other than an SMATV operator, was not the result of Liberty's efforts.

The evidence shows that more than a month after it had filed its misleading OFS applications with the Commission, Liberty filed suit in U.S. District Court on December 8, 1994 seeking declaratory and injunctive relief against the DOITT for requiring Liberty to obtain a cable franchise to provide service to non-common buildings using hardwire connections.[125] However, Liberty did not name the United States or the FCC as a defendant. Rather, *on its own initiative*, the United States intervened as a defendant in January 1995, two months after Liberty had filed the misleading applications with the Commission. Therefore, even if the presence of the United States as a party in a lawsuit about the legality of Liberty's use of cable interconnections between non-commonly owned buildings is sufficient "notice" under the Commission's Rules that Liberty was not, as it had described itself in its November 7, 1994 OFS applications, an "SMATV operator," that "notice" was not timely provided.[126]

Moreover, the concept of "notice" implies some affirmative act of communication by the party who is giving notice. There was no such affirmative action by Liberty here. Although some of Liberty's non-common systems were identified in a January 30, 1995 affidavit filed by TWCNYC in Liberty's federal litigation, that list was the product of TWCNYC's own efforts to compare the list of non-common systems that Liberty had provided to the NYSCCT under seal in June 1994 -- and which TWCNYC had just obtained

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[125]Id. at ¶ 63.

[126]See 47 C.F.R. §1.65.

in late January 1995 -- with a list that TWCNYC had compiled of all 18 GHz applications that Liberty had filed with the FCC since 1991.[127] In short, Liberty did nothing to amend its pending applications before the FCC to correct the wrong information about the nature of its business or even report the lawsuit it had brought against New York City that concerned these cable interconnections between non-commonly owned buildings.

Only when TWCNYC filed its first Petition to Deny Liberty's OFS applications on or about January 9, 1995 did the Commission have any formal communication that Liberty was not just an SMATV operator.[128] TWCNYC's argument in the Petition to Deny was not that the Commission should directly enforce the franchising requirements of federal and New York law. Rather, the argument was that Liberty had wrongly concealed from the Commission the fact that it was engaged in conduct that was contrary to law and which, had the Commission been aware of it, would have rendered Liberty ineligible for additional OFS licenses because the proposed use of the facility would have been unlawful within the meaning of Section 94.33(b) of the Commission's Rules.

In its Opposition, Liberty neither disputed TWCNYC's allegations regarding its construction of hardwired facilities; nor did it squarely acknowledge that it was operating non-common systems.[129] Instead, Liberty merely protested that TWCNYC had misread the law in arguing that Liberty was not eligible to hold the licenses applied for. Although

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[127]JX 21. It should be recalled that in June 1994, Liberty provided the NYSCCT, under seal, with a list of its Non-Common Systems; that list was not made available to Time Warner until January 1995.

[128]See Jt. Mot. at ¶ 68.

[129]JX 30.

Liberty's Opposition tacitly noted the company's "cable operations" and "status as a cable operator," it dismissed those operations as "an incidental aspect of its business" that affected only a "small part of its network."[130] Moreover, notwithstanding the fact that all of Liberty's November 7 OFS applications were seeking to replace illegal hardwire connections, Liberty represented that "the majority of Liberty's service is private cable/SMATV service and the applied for licenses are used in the provision of that service."[131] This statement is irrelevant because there is no quantitative test by which an integrated video programming delivery system that uses a combination of microwave and coaxial cable is determined to be a "cable system." The Cable Act provides only that *any* use of cable to interconnect non-commonly owned properties is sufficient.[132]

4. Liberty's Continued Flouting of the Cable Act.

Not mentioned in the Joint Motion is the fact that on or about February 6, 1995 -- during the pendency of TWCNYC's Petition to Deny and less that two weeks after Liberty had filed its Opposition with the Commission -- Liberty began service at yet another address by means of an illegal hardwire interconnection, its twelfth, 225 E. 74th St.[133] Liberty did not report this event to either to the Commission or to local regulatory authorities.

Even though, on March 13, 1995, Judge Preska issued her decision in Liberty Cable Co. v. City of New York that effectively ended Liberty's chances of blocking NYSCCT's

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[130]JX 30 at 5.

[131]JX 30 at 6.

[132]See U.S.C. § 522(7).

[133]HDO, App. B.

enforcement of the cable franchising requirements against Liberty, the company was undauntedly defiant.[134] When asked whether Judge Preska's decision had any effect on Liberty's operation of non-common systems, Mr. Price obfuscated, professing that he did not understand the question.[135] Thus, when asked more specifically whether Liberty had stopped constructing cable-interconnected facilities at Lincoln Harbor as a result of Judge Preska's decision, Mr. Price said "I don't have a clue."[136] When asked if he had ordered anyone to stop construction of those facilities, Mr. Price said "I wasn't involved in the Lincoln Harbor transaction and I didn't give any orders regarding Lincoln Harbor. Is that clear enough?"[137]

Notwithstanding Judge Preska's ruling in Liberty Cable Co. and Liberty's clear understanding of the law (as evinced in its complaint in Liberty Cable Co.) that the provision of service to via hardwire connection requires a cable franchise under federal law, on April 13, 1995 Liberty began providing unfranchised cable service in New Jersey to the Lincoln Harbor Yacht Club, Liberty's thirteenth hardwire interconnection.[138] Unlike Liberty's attempts to justify its establishment of cable interconnections between non-common buildings in New York, Liberty made no similar effort to excuse its illegal activity in New Jersey. Mr. Price conceded under cross-examination that he did not have any contact with

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[134]Jt. Mot. at ¶ 65.

[135]Price May 31 Dep. at 39-41 (Ex. 3).

[136]Id. at 41:2-6.

[137]Id. at 41:10-13.

[138]HDO, App. B; Jt. Mot. at ¶ 66.

officials from New Jersey regarding Liberty's plans to construct that system.[139] Nor was Mr. Price ever made aware of any such contact by anyone else at Liberty.[140] Thus, while Liberty clearly knew of its franchise obligations under federal law, it made no inquiry of New Jersey officials about the need for a cable franchise. The absence of any effort to communicate with New Jersey officials is particularly revealing given that the New Jersey system was not a part of Liberty's federal lawsuit, nor was it a system at issue before New York regulatory officials. Indeed, the evidence shows that Liberty was specifically focused on the implications of its hardwire connection at the Lincoln Harbor site, but that it said nothing about that site to the Commission or to New Jersey regulatory officials.[141]

The Joint Motion seeks to justify Liberty's actions by asserting that "Liberty entered into a contract directly with . . . [LHYC] and has no individual subscribers there. This hardwire interconnection, Liberty believed, did not create a 'cable system,' because there were no subscribers at the Lincoln Harbor Yacht Club."[142] However, that argument is not only unsupported by the record -- despite Liberty's burden under the HDO, no evidence has been presented to bolster that claim -- it was specifically considered and rejected in a cogent

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[139]Price May 31 Dep. at 31-32 (Ex. 3).

[140]Id.

[141] See, e.g., JX 7 at 2 (July 13, 1995 Memorandum in which Price specifically observes that "the New Jersey site was not part of our lawsuit which encompasses only New York sites but a path should still be filed").

[142]Jt. Mot. at ¶ 66 (citations omitted).

analysis provided by the NYSCCT when Liberty advanced it in connection with its New York systems.[143]

The citation provided by the Joint Motion to support the conclusion that Liberty has no subscribers at Lincoln Harbor -- and the only "evidence" offered by the Joint Motion on this topic -- is to a pair of off-hand statements of position that were made by Liberty's counsel, one during Mr. Foy's deposition,[144] and the other at the close of Mr. Price's May 28, 1996 deposition.[145] No testimony by a Liberty witness in this proceeding was cited by the Joint Motion in support of this conclusion.

Moreover, Liberty itself referred to its Lincoln Harbor "subscribers" in filings with the Commission. On December 22, 1995, Liberty filed with the Commission an STA request for an OFS path to Lincoln Harbor that had been applied for some months earlier.[146] In that STA request, Liberty represented to the Commission that grant of the requested STA was in the public interest because it would "permit Liberty to honor its obligations to its customers" and would "allow Liberty's customers uninterrupted service."[147] Liberty further represented that "in order to compete effectively with

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[143]In the Matter of Petition of Time Warner Cable of New York City, etc., Docket No. 90460, Order to Cease and Desist (rel. Nov. 30, 1995), attached as Exhibit A to TWCNYC's "Opposition to Motion to Delete Issue" in this proceeding (filed April 19, 1996).

[144]Foy Dep. at 104:11-18 (Ex. 15).

[145]Price May 28 Dep. at 280-281 (Ex. 3).

[146]Price Ex. G (Ex. 3).

[147]The evidence shows that Liberty regularly used the terms "subscribers" and "customers" interchangeably.

Cablevision, Liberty must be allowed to continue its service to subscribers in those buildings that switch from Cablevision to Liberty."[148] Thus, Liberty claimed that if it "cannot meet its customers' demand for service, those potential customers will cancel their contracts with Liberty."[149] Liberty closed by urging the Commission to consider the "public's right to receive service in a timely manner and the public's right to lower prices brought about by competition."[150]

Notably, Liberty's use of the words "subscribers" and "customers" in its Lincoln Harbor STA request was similar if not identical to Liberty's use of those words in other STA requests that it had filed relating to non-common systems where the Joint Motion does not dispute that Liberty had "subscribers."[151] Indeed, when questioned about the term "subscribers" during his deposition, Liberty's president explained that the word was intended to mean "the customer who pays for service."[152] Moreover, when questioned about Liberty's use of the word in a pleading that Liberty had filed with the Commission in June 1996, Price acknowledged that Liberty had used the term to mean "an individual subscriber" served by Liberty.[153]

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[148]Price Ex. G at 2 (emphasis added) (Ex. 3).

[149]Id. (emphasis added).

[150]Id.

[151]See, e.g., JX 31 (Liberty STA request dated July 12, 1995 relating to 44 West 96th Street); Price Ex. F (Ex. 3).

[152]Price May 31 Dep. at 54:7-8 (Ex. 3).

[153]Id. at 55:15-56:3; see also id. at 27:5-16.

To the end, Liberty continued to violate the Cable Act's provisions mandating a franchise for cable interconnections of non-common buildings and continued to say whatever was expedient in its representations to the Commission, with only an incidental regard to those representations' veracity.

C. Liberty Deliberately Misrepresented To The Commission Its Plans For Hardwire Interconnection.

In July 1995, Liberty again made blatant misrepresentations to the Commission in the captioned applications for authority to operate microwave paths. Liberty, in a document executed on July 6, 1995 by Peter O. Price and submitted to the Commission on July 12, 1995, states as follows:

> Although the receive sites located at 170 West End, 55 Central Park, 150 and 152 West 57th Street are presently fed via hardwire connections from non-commonly owned, managed or controlled buildings located at 160 West End and 10 West 66th Street and Park Meridian respectively, grant of the pending application will permit Liberty to convert the connection to microwave and discontinue the hardwire connection. *The facilities will not be extended by a hardwire connection unless and until Liberty is authorized to make such a connection or unless such a connection is otherwise authorized by law.*[154]

Only one month later, in a document dated August 9, 1995, and submitted to the Commission on August 18, 1995, Liberty represented:

> Consistent with the defined meaning of the word, *Liberty has no plan to install additional Non-Common interconnections until 'authorized' to do so.*[155]

Both of these statements are false. Liberty, in fact, had plans to "install an additional Non-Common interconnection" (to 22 West 66th Street) and "extend by hardwire connection"

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[154]Amendment of Modification Application, FCC File No. 708778, FCC Call Sign WNTM210; 20 West 64th Street, NYC (One Lincoln Plaza) (Ex. 16).

[155]Reply to Opposition to Requests for Special Temporary Authority at 8 (Ex. 17).

the facilities" at 10 West 66th Street, all without FCC authorization to do so. As the attached declaration from a witness with personal knowledge of the illegal connection shows,[156] these statements were made and submitted to the Commission immediately *before* the illegal coaxial cable connection was made. Moreover, documents from Liberty show that as of July 19, Liberty had made arrangements to provide hardwire cable service to the Europa at 22 West 66th Street.[157] When Mr. Barr made the filings containing the statements of intent not to interconnect non-common buildings, Liberty had every intention of doing just the contrary. Finally, as far as the state body with regulatory authority was concerned, Liberty was not "authorized" to make those connections.

In October, 1995, the NYSCCT issued an Order to Show Cause, requiring Liberty to show why its hardwire connection to 22 West 66th Street should not be determined to be a violation of the NYSCCT's standstill order (which forbade Liberty from making additional hardwire connections). The NYSCCT stated "[i]t fully appears that Liberty is engaged in the operation of a cable television system by the interconnection by wire of two buildings -- 10 West 66th Street and 22 West 66th Street -- which are not commonly owned, controlled or managed."[158]

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[156]Declaration of Al Ruggiero, a construction foreman for Time Warner Cable of New York City, dated September 28, 1995 (Ex. 18).

[157]Ex. 4 to Price Dep. (Ex. 3).

[158]New York State Commission on Cable Television, Further Order to Show Cause, October 26, 1995 (Ex. 19).

TWCNYC and Cablevision acknowledge that the Presiding Judge has stated that the interconnection of the Europa is outside the scope of issues designated in the HDO.[159] TWCNYC and Cablevision, however, respectfully disagree. There is no question that the statements made regarding Liberty's intention to use additional hardwire interconnection were made in support of the captioned applications and, one of the issues specified in the HDO is "to determine whether Liberty Cable Co., Inc. in relation to its interconnection of non-commonly owned buildings and its premature operation of facilities, misrepresented facts to the Commission, lacked candor in its dealings with the Commission or attempted to mislead the Commission." The D.C. Circuit has held that, once a party has protested the grant of an application (or applications) with sufficient particularity such that the application is designated for hearing, "the Commission is free to consider any issue bearing on the qualifications of the licensee or the required finding of public interest, convenience and necessity; it is not limited to issues raised by the protestant."[160] Furthermore, "the Commission should not conclude its hearing until it has built up a record sufficient to support its final conclusions."[161] While it is true that the HDO does not specify the Europa in Appendix B, that is because, unlike the addresses in Appendix B, Liberty never applied for an OFS license to replace an existing (and previously undisclosed) hardwire interconnection. Thus, if relevant evidence that is not specifically designated in the HDO exists, that evidence

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[159]Memorandum Opinion and Order dated May 14, 1996, regarding TWCNYC's April 29, 1996 Consolidated Motion to Compel Responses to Interrogatories and Production of Documents by Bartholdi Cable Co., Inc. (Ex. 20).

[160]Federal Broadcasting System, Inc. v. FCC, 225 F.2d 560, 564 (D.C. Cir. 1955) (emphasis added), cert. denied, 350 U.S. 923 (1955).

[161]Id. at 565.

should be included in the record so that the Commission has as much information as possible that is relevant to the issues that are expressly designated in the HDO.

The D.C. Circuit has also determined that 47 U.S.C. § 309, the provision under which radio license applications are designated for hearing, "contemplates that, in appropriate cases, the Commission's inquiry will extend beyond matters alleged in the protest in order to reach any issue which may be relevant in determining the legality of the challenged grant."[162] The D.C. Circuit went on to state that "the inquiry cannot be limited to the facts alleged in the protest where the Commission has reason to believe, either from the protest or its own files, that a full evidentiary hearing may develop other relevant information not in the possession of the protestant."[163] In the present case, TWCNYC seeks to include statements made by Liberty about an address not specifically listed in the Appendices to the HDO, but were made in support of the captioned applications and are therefore relevant to the designated issue of Liberty's candor with the Commission. Under Clarksburg, such evidence is within the scope of the HDO because they are relevant to issues specifically designated therein. Especially in this case, where the applicant's character is at issue, it would be wrong for evidence of such cynical misstatements to the Commission to be excluded.

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[162]Clarksburg Publishing Co. v. FCC, 225 F.2d 511, 515 (D.C. Cir. 1955) (emphasis added); see also L.B. Wilson, Inc. v. FCC, 397 F.2d 717, 719-20 (D.C. Cir. 1968).

[163]Clarksburg, 225 F.2d at 515.

III. ADDITIONAL DISCOVERY IS NEEDED

A. Discovery In This Proceeding Is Not Complete.

Liberty has taken advantage of the fact that this case has proceeded under an accelerated timetable by being late and less than forthcoming with the discovery responses it agreed to make. As a result, depositions of key witnesses were taken before crucial documents were produced. Moreover, with respect to a particular issue that evidently is highly relevant to this case -- Liberty's practice with respect to the filing of STA requests -- Liberty has repeatedly obstructed deposition questioning with instruction not to answer. A chronology illustrates the problems with discovery.

In accordance with the Prehearing Conference Order, TWCNYC, along with the Bureau, promptly served their respective interrogatories and requests for production on Liberty on April 3, 1996.[164] Liberty served its "responses" on April 15, 1996.[165] Liberty's "responses" to the Bureau's interrogatories consisted of unidentified lists of up to 140 names of persons who allegedly had knowledge of relevant facts.

The Joint Motion asserts that "[o]n April 15, 1996, Liberty served approximately 15,000 pages of documents responsive to the Bureau's document demands."[166] The Joint Motion claims that Liberty's production in response to the Bureau's requests was "completed" on April 29, 1996. These claims are misleading, and fail accurately to portray Liberty's attempts to delay the discovery process until depositions were completed.

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[164]See Scheduling Order at ¶ (I)(1).

[165]Responses and Objections to Time Warner's First Set of Interrogatories and First Request for Production of Documents, filed April 15, 1996.

[166]Jt. Mot. at ¶ 8.

After joint discussions, Liberty produced some 15,000 documents to the Bureau on April 15, 1996. TWCNYC had anticipated that Liberty would have confidentiality concerns and first circulated a proposed confidentiality order well before the production date, on or about April 4, 1996.[167] Moreover, TWCNYC and Cablevision informed Liberty by letters delivered on April 15 and 19, 1995, that they would treat documents produced as confidential until a confidentiality order was entered by the Presiding Judge. Liberty nevertheless refused to produce documents to either TWCNYC or Cablevision, when it produced those same documents to the Bureau.

Nonetheless, rather than immediately moving to compel, TWCNYC, Cablevision and the Bureau filed a joint motion for extension of time to file a motion to compel, in hopes that the parties could reach an agreement without the need to compel production. The Presiding Judge granted that motion and ordered that Liberty's motion to compel, already filed, be held in abeyance.[168]

Depositions were to be noticed by April 26.[169] Liberty finally produced its first box of documents to TWCNYC and Cablevision -- in response to the Bureau's discovery requests -- on April 22. More boxes arrived over the following two days. The production remained incomplete, however, on April 26. The bulk of the production was not completed until April 29, 1996.[170] Furthermore, pursuant to agreement with the Bureau, Liberty produced

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[167]Memo from R. Bruce Beckner to all counsel in the WT Docket 96-41 proceeding, dated April 4, 1996 (Ex. 21).

[168]Order, WT Docket 96-41, dated May 16, 1996.

[169]See Scheduling Order at ¶ (I)(5)

[170]See TWCNYC's Discovery Report, filed May 15, 1996, at Exhibit A thereto.

only a sampling of other important documents, including a sampling of only six weekly Technical Operations Reports.[171]

At 4:30 p.m. on April 26, Liberty supplemented its answers to the Bureau's interrogatories to give at least some of the information originally requested. As a consequence, TWCNYC and Cablevision had four days to review and analyze approximately 15,000 documents and half an hour to divine information from Liberty's supplemental interrogatory responses in order to notice depositions. Even Liberty's April 26 responses were inadequate. The Bureau summarized the situation appropriately:

> Liberty filed Bartholdi Cable Co. Inc's Responses and Objections to Wireless Telecommunications Bureau's First Set of Interrogatories ("Responses") on April 15, 1996. The Bureau's review of the Responses revealed that the information contained therein was neither responsive in form nor substance.... On Friday, April 26, 1996, at approximately 4:07 p.m., Liberty served [its supplemental responses] on the Bureau. The information therein still lacked the specificity called for by the instructions to the Bureau's interrogatories and the Bureau was still unable to notice any depositions. . . .[172]

Based on this impossible situation, TWCNYC and Cablevision each filed a Statement Regarding Present Inability to Notice Depositions.

Left with no other choice, both the Bureau and TWCNYC moved to compel Liberty to answer interrogatories on April 29. In sum, neither the Bureau, TWCNYC nor Cablevision could notice depositions because Liberty had delayed its discovery responses, apparently in hopes that the other parties would be forced to take depositions with inadequate

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[171]See FCC/CP 015467-015513.

[172]Wireless Telecommunications Bureau's Report on Status of Scheduling Depositions, May 15, 1995, at 2-3 (parenthetical added).

information. Not until May 21, 1996, did Liberty again supplement its responses to the Bureau's interrogatory requests.[173]

Left with little choice because of the Presiding Judge's order, the parties proceeded to take depositions. In an attempt to thoroughly explore the facts and circumstances surrounding Liberty's unauthorized operation of OFS systems and hardwire cable operations, the Bureau, TWCNYC and Cablevision sought to depose 27 present or former Liberty employees,[174] whom the parties believed, based on Liberty's interrogatory responses, had relevant information important to the case. The Presiding Judge, without addressing the relevancy or extent of the proposed deponents' knowledge, simply cut the list in half. The Presiding Judge stated:

> I am saying before we leave here today I am requiring you to remove, I am requiring you to remove, at a minimum half of these witnesses. And I want you to then work on, based on further information that you are getting, even whittle that down because these depositions have got to start, and they have got to start immediately.[175]

Although the depositions were supposed to be day-to-day until completed, Liberty treated the depositions as one day per deponent, regardless of how much information a given deponent possessed. Cablevision, for example, had to seek an extension to properly and fully depose Mr. Price.[176]

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[173]Bartholdi Cable Co. Inc's Second Supplemental Responses and Bartholdi Cable Co. Inc.'s Third Supplemental Responses to the Wireless Telecommunications Bureau's Third Set of Interrogatories, May 21, 1996.

[174]Hearing Transcript of May 15, 1996, at 72:5-10 (Ex. 22).

[175]Id. at 72:23-73:3.

[176]See Price May 28 Dep. at 267:14-273:4 (Ex. 3).

In response to a request by TWCNYC (and over Liberty's objection), by order released June 13, 1996, the Presiding Judge directed Liberty to create a log of those documents responsive to the Bureau's request that Liberty had withheld based on privilege. On June 17, 1996, after the depositions in this case had been concluded, and after the Presiding Judge ordered a stay of the proceedings, Liberty provided a privilege log to the other parties. Liberty also produced, on June 17, in heavily redacted form, the periodic license inventories compiled by Pepper & Corazzini. In its letter enclosing the inventories, Liberty claimed that "we determined that certain documents which were initially withheld on grounds of privilege were not privileged. . . . Although these documents are technically responsive to the Wireless Telecommunications Bureau's April 3 document request, we doubt whether they would add anything of substance to the record."[177]

These documents, which included the Lehmkuhl Memorandum, were among the most important in the case; and they reflect nothing that would support a valid claim of privilege. They showed that Liberty's FCC counsel had advised the company that it did not have authority to activate a number of paths that it recently had activated. TWCNYC thus moved to compel, among other things, production of unredacted versions of the inventories Liberty produced. On June 26, 1996, the Presiding Judge granted TWCNYC's request, and ordered Liberty to produce the unredacted versions.

Based on the unredacted versions of these documents, TWCNYC promptly moved to take the deposition of Howard Barr, an attorney at Pepper & Corazzini whom Liberty

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[177]Letter from Eliot Spitzer, Counsel for Liberty, to Joseph Weber, R. Bruce Beckner, and Christopher A. Holt, June 17, 1996 (Ex. 22).

believed had relevant knowledge about the Memorandum's creation and about when Liberty knew about its illegal microwave operations. Although the Presiding Judge denied TWCNYC's motion to take the deposition, the judge permitted TWCNYC and the other parties to depose Mr. Price, Mr. Nourain, and Mr. Lehmkuhl again. The Presiding Judge, however, limited the scope of the depositions to "the facts and circumstances surrounding the preparation, knowledge and use of the Memorandum."[178]

Predictably, neither Mr. Price nor Mr. Nourain would admit to having seen the memorandum. It is undisputed, however, that Mr. Lehmkuhl sent the Memorandum to Liberty. Mr. Lehmkuhl testified:

Q: Did you send this document to Peter Price and Mr. Nourain?

A: Yes I did.[179]

Moreover, neither Mr. Price nor Mr. Nourain denied receiving the document. They merely alleged that they did not remember seeing it.[180]

Further mysteries exist about the Lehmkuhl Memorandum. Although it is undisputed that Mr. Lehmkuhl sent the memorandum to Mr. Price and Mr. Nourain at Liberty, the only copy of the Lehmkuhl Memorandum produced came from Pepper & Corazzini. For some unexplained reason, Liberty never produced the Lehmkuhl Memorandum -- or any of the other four periodic license inventories that had been produced from Pepper & Corazzini files -- from either Mr. Price or Mr. Nourain's files. Mr. Nourain testified that he never threw

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[178]Order, July 29, 1996.

[179]Lehmkuhl Aug. 7 Dep. at 89:7-9 (Ex. 7).

[180]See Price Aug. 1 Dep. at 132:23-133:17 (Ex. 3); Nourain Aug. 1 Dep. at 20:12-16 (Ex. 6).

such documents away, and that he instead kept them in the files in his office.[181] Yet, somehow, the Lehmkuhl Memorandum and the other license inventories are missing from the offices of both Mr. Price and Mr. Nourain. Liberty has not responded to the requests of TWCNYC's counsel for a re-search of Mr. Price's and Mr. Nourain's files to see if any of the license inventories are contained therein.

Finally, despite its argument that Mr. Nourain mistakenly believed that STA requests had been granted for 14 of the microwave paths in questions, Liberty has vigorously asserted the attorney-client privilege and instructed witnesses not to answer questions about Liberty's STA filing practices. For example, Cablevision attempted to elicit testimony from Mr. Lehmkuhl in his August 1996 deposition about the circumstances under which he was to file STA requests for Liberty:

> Q: Your understanding that you were not to file STAs unless you were specifically requested by Liberty, was that understanding based on any discussions with anyone at Liberty or anyone at Pepper & Corazzini?
>
> [Mr. Spitzer]: I am going to instruct the witness not to answer because, first, it is privileged and, second, this does not relate to anything that pertains to the preparation, knowledge or use of the February 24, 1995 memorandum.
>
> [Mr. Kirkland]: Are you instructing the witness not to answer?
>
> [Mr. Spitzer]: Yes. I am. That is correct.
>
> . . . .
>
> [Mr. Kirkland] Q: Did you ever convey to anyone at Liberty that it was your plan to routinely file requests for STAs at the same time you requested license applications?

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[181]Nourain Aug. 1 Dep. at 21:2-22:3 (Ex. 6).

[Mr. Spitzer]: I am going to instruct the witness not to answer. This is beyond the scope of the deposition.

Q: In your experience generally STAs are requested when there is some exigent circumstances; is that correct?

[Mr. Spitzer]: I am going to instruct the witness not to answer.[182]

Liberty similarly obstructed discovery of its STA procedures in other depositions. In Mr. Stern's deposition, Liberty made a "standing objection" when the subject of STAs came up.[183] Liberty made similar objections in the May, 1996 deposition of Mr. Lehmkuhl,[184] the August 1996 deposition of Mr. Nourain,[185] and the May 28, 1996 deposition of Mr. Price.[186]

In sum, Liberty wants to have its cake and eat it too. Liberty asserts that Mr. Nourain assumed the filing of STA requests on a regular basis and the grant of such requests in the ordinary course. This mistaken belief, the Joint Motion argues, led Mr. Nourain to activate unlicensed microwave paths.[187] The limited evidence available casts grave doubts on the veracity of these assertions, and Liberty has done its best to shield them from scrutiny in depositions.

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[182]Lehmkuhl Aug. 7 Dep. at 161-163 (Ex. 7).

[183]Stern Dep. at 28-30 (Ex. 9).

[184]Lehmkuhl May 22 Dep. at 31-35 (Ex. 7).

[185]Nourain Aug. 1 Dep. at 49-52 (Ex. 6).

[186]Price May 28 Dep. at 41 (Ex. 3).

[187]Id.

B. Additional Discovery Is Needed.

While this incomplete record already shows the existence of disputed issues of material fact that require a hearing in this proceeding, TWCNYC and Cablevision believe that limited additional discovery is required for two reasons: to fulfill the Commission's mandate in the HDO that the "facts and circumstances" surrounding Liberty's use of illegal cable interconnections and use unlicensed microwave facilities and to show the existence of additional disputed issues of material fact regarding Liberty's lack of candor with the Commission in pursuit of the captioned applications.

* The Internal Audit Report must be made available to all parties and to the Presiding Judge. TWCNYC and Cablevision are cognizant of Liberty's pending appeal to the D.C. Circuit of the Commission's Order directing Liberty to make the IAR publicly available. TWCNYC and Cablevision respectfully suggest that all parties to the appeal (TWCNYC, the Commission and Liberty) jointly move the D.C. Circuit for expedited handling of the appeal.

* Lloyd Constantine should be deposed about the basis for his affidavit that asserts that Howard Milstein knew about Liberty's unlicensed microwave operations in "late April" of 1995. This affidavit contradicts Mr. Milstein's deposition testimony in this proceeding. Either this affidavit is false -- in which case it is another misrepresentation by Liberty in support of the captioned applications -- or Mr. Milsteins's sworn deposition testimony in this proceeding is false.

* Howard Barr should be deposed about the sources of information for his June 16, 1995 letter to the Commission, which failed to identify all of Liberty's unlicensed,

operational microwave paths; about his knowledge and use of the Lehmkuhl Memorandum in formulating Liberty's May 17, 1995 Surreply and his June 16, 1995 letter; about what his law firm's instructions from Liberty were with respect to preparing inventories of Liberty's OFS licenses; about what his law firm's instructions were from Liberty with respect to the filing of STA requests; and about what "compliance" responsibilities his law firm had before and after June 1, 1995.

* Michael Lehmkuhl should be recalled to permit him to be examined about what instructions he had for filing STA requests during 1994 and the first half of 1995.

* Howard Milstein, Edward Milstein and Peter Price should be recalled to be examined about the negotiations or discussions that were taking place in the first four months of 1995 with respect to a possible sale of Liberty Cable or its assets and what relationship, if any, those discussions had either to Liberty's "premature" activation of microwave facilities or to the discovery of Liberty's unlicensed microwave operations.

* Steve Coran should be deposed, as TWCNYC and Cablevision have requested on August 23, 1996, about the results of his "due diligence" review of Liberty's OFS licenses conducted in March and April 1995 and about whether those results were communicated to anyone at Liberty.

* The custodian of Liberty's files and records should be deposed about the fate of the files that contained all of Liberty's license inventories that were prepared by Pepper & Corazzini.

IV. ARGUMENT

A. The Burden Of Persuasion Lies With The Movant.

Liberty and the Bureau, as moving parties, carry the burden of persuasion on summary decision. The Commission's rules are explicit:

> The party filing the motion may not rest upon mere allegations or denials but must show, by affidavit or by other materials subject to consideration by the presiding officer, that there is no genuine issue of material fact for determination at the hearing.[188]

To sustain its burden, the moving party must establish that the truth is clear, that the basic facts are undisputed, and that the parties are not in disagreement regarding material factual inferences that may properly be drawn from such facts.[189] Furthermore, where a hearing designation order specifies as an issue the "facts and circumstances surrounding" an event, the license applicant must "present evidence on these matters and its inability or unwillingness to do so constitutes a failure of proof under the issue and is a ground for resolving the issue unfavorably" against the applicant.[190] This is especially true where the essential facts lie plainly within the knowledge of the applicant, and where the applicant "adopts the posture of remembering very little" about them.[191] Consequently, as movants, Liberty and the Bureau carry the burden of showing that there is no genuine issue of material

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[188]47 C.F.R. § 1.251(a)(1)

[189]Big Country Radio, Inc., 50 FCC 2d 967 (1975).

[190]Salinas Broadcasting, 4 FCC Rcd 2762, 2770 (1989).

[191]See id.